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Judicial Ethics Opinion JE-64

Formal Opinion

Question: May a Kentucky judge or justice, consistently with the Code of Judicial Conduct, serve as a member of the Board of Trustees of a public university?

Answer: Qualified Yes. References: Code of Judicial Conduct, SCR 4.300 Canon 5B and 5G and Judicial Ethics Opinions from various federal and state jurisdictions.

The Judicial Ethics Committee received a letter from a judge requesting an opinion whether he might, consistently with the Code of Judicial Conduct, serve as a member of the Board of Trustees of a public university. The judge has not yet accepted the appointment; therefore, the Judicial Ethics Committee has jurisdiction to consider the question.

I. On the Issue of Whether a Judge  
May Serve as Trustee on the Board of a  
Public University, Secondary  
Authorities are Divided.

In researching the question of whether a judge may serve as a trustee on the board of a public university, the Judicial Ethics Committee reviewed the ethics opinions of several other jurisdictions which have considered the issue. The opinions split roughly in half. The federal courts and Georgia do not permit their judges to serve as trustees. Alabama, South Carolina and Florida permit it. Across the United States, roughly 106 judges are serving as trustees on university boards. Thode, Reporter's Notes to Code of Judicial Conduct, (1973), pp. 79-80.

In giving its reasons for prohibiting judges from serving as trustees, the federal Advisory Committee on Judicial Activities Advisory Opinion No. 44 points out that the Code contradicts itself. The Kentucky Judicial Ethics

Committee agreed. Canon 5B, "Civic and charitable activities," explicitly provides that a judge may serve as a trustee of an educational organization. In granting this permission, the Ethics Committee did not believe that the Code meant to limit its permission to private universities only.

Canon 5G then states under "Extra-judicial appointments:"

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

The Committee believes that if the language of Canon 5G is taken literally, a judge's service as a trustee is prohibited. However, in reviewing the commentary accompanying Canon 5G, the Committee came to the conclusion that the prohibition of Canon 5G was meant to apply to large-scale, time-consuming, investigatory commissions such as the Warren Commission. ABA/BNA Lawyers Manual on Professional Conduct, Section 61:2703 (1986-). Service as a trustee on a board of a public university is something entirely different.

## II. A Judge May Serve as Trustee Subject to Certain Limitations.

The Judicial Code of Ethics expressly provides that a Judge may serve as trustee of an educational organization. Canon 5B states:

"Civic and Charitable Activities. A Judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A Judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:


- (1) A Judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be

regularly engaged in adversary  
proceedings in any Court. . . ."

In a unanimous vote, the Judicial Ethics Committee is giving a preliminary approval to a judge's service as a trustee, but, it is subject to certain limitations. A judge may not serve as a legal advisor to a Board. He may not participate in fund raising. And, he may not vote or participate in any matter that appears likely to result in litigation. Once the University is involved in litigation before a judge, a judge must recuse himself, and this prohibition applies to all levels of litigation before the courts including the consideration of discretionary reviews.

Whether the university in question is regularly involved in litigation is primarily a decision a judge must make for himself. At this time, the Committee does not know whether the universities are involved in litigation so much that Canon 5B(1) would be violated. The Judge is in the position to determine the facts. Thus, the Committee gives a qualified yes if the Judge determines he is not in violation and that the necessity of recusing himself in possible cases involving universities coming before his Court will not present a onerous situation.

Finally, the Committee does not believe that having judges serve as trustees on colleges and universities around the State will bring harm to the judiciary. Rather, they believe it can only enhance the judiciary. Judges are elected officials and they must be allowed to participate in activities where they may be visible.

  
B. M. Westberry, Chairman  
Judicial Ethics Committee